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March 7, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in MM Docket 92-266

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, United Broadcasting Corporation ("UBC"), through undersigned counsel, submits this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On March 7, 1996, the undersigned met with Gary Laden, Lynn Crakes, Julie Buchanan and Ed Gallick of the Cable Services Bureau. The meeting dealt with the maximum permissible rates for commercial leased access channels, including matters set forth in the attached written presentation of UBC. Copies of the attached written presentation were given to the FCC attendees at the meeting on March 7, 1996.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE

By
Tillman L. Lay

Enclosure

cc: Gary Laden, Esq.
Lynn Crakes, Esq.
Julie Buchanan, Esq.
Ed Gallick

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TELEMIAMI
TELEVISION CABLE NETWORK

March 5, 1996

Via Hand Delivery

The Honorable Reed E. Hundt - Chairman
The Honorable James H. Quello - Commissioner
The Honorable Andrew C. Barrett - Commissioner
The Honorable Rachelle B. Chong - Commissioner
The Honorable Susan Ness - Commissioner
Chairman and Commissioners
Federal Communications Commission
1919 M Street, N.W.
Washington D.C. 20554

RE: Commercial Leased Access Reconsideration - MM Docket No. 92-266
Experiences of a Leased Access Programmer under the Implicit Fee Formula

Honorable Commissioners:

In a new Telecommunications Age that is still in its infancy, the FCC must safeguard the public interest. In an era of multi-billion dollar mega-mergers and untested technological pioneering, the Commission must keep one simple, crucial concept in mind: the ability to communicate ideas must be available to all and not be dominated by a few large corporations and their chosen programmers. The leased access provisions of the Cable Act are intended to serve this important public interest. But while commercial leased access looks good in the statute books, in practice it has failed miserably to date. The FCC must not leave leased access in the hands of MSO's driven by "The Deal," rather than the ideal of service to the public.

The Law -- A Promise Unfulfilled

Congress sought to insure the continued flow of communication from diverse sources, by passing into law Section 612 of the Cable Act of 1984 which provides access to cable systems by channel leasing to third parties who are unaffiliated to cable operators. Section

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612 imposes set-aside requirements upon cable operators "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[1]

As required by the 1984 Act, the Federal Communication Commission issued a report to Congress in 1990 on the functioning of the Act and found that:

> Although encouraging leased access programming was a key purpose of the Cable Act, existing enforcement provisions are too cumbersome to permit the development of leased access as a promising force in the video market. The lack of adequate remedies for any programmer denied fair access to local cable distribution has retarded the overall development of leased access programming.[2]

The Commission made recommendations for changes to the law, and the 1992 Cable Act amendments to Section 612 were consistent with the Commission's findings. The statutory purpose of Section 612 was broadened to include "the promotion of diverse sources of video programming," and the Commission was provided with expanded authority to establish the reasonable rates, terms and conditions that a cable operator must provide to leased access programmers; and the authority to establish procedures for expedited resolution of disputes.[3]

Pursuant to the Congressional directive in the 1992 Cable Act, the Commission issued its May 3, 1993 Report and Order, where it set forth a rate structure based upon an "implicit fee" formula, along with the procedure for resolving disputes.[4] In the Report and Order, the Commission noted that the House Committee Report on the 1984 statute:

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[1] Communications Act, Section 612 (a), 47 U.S.C. Section 532 (a).

[2] Report, MM Docket No. 89-600, ("1990 Cable Report"), 5 FCC Rcd at 4973 (1990).

[3] Communications Act, Section 612 (c)(4)(A)(i)(ii)(iii), 47 U.S.C. Section 532 (c)(4)(A)(i)(ii)(iii).

[4] Order for Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, 8 FCC Rcd 5631 (1993), at ¶¶ 485-539. See also, 47 C.F.R. 76.970.

> [expressed] concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users out of competitive motives, especially if the operator had a financial interest in the programming services it carried.[5]

The Commission further noted that the Senate was also concerned that "leased access programmers be offered a 'genuine outlet' for their product."[6]

To that end, the Commission designed a method of calculating the "maximum reasonable rate" for commercial lease access based upon the "expectation that , under these conditions, interest in the use of the leased access market will rise because rates will be low enough to entice programmers, particularly in the programming classifications with the lower implicit fees, to use leased commercial access."[7] The Commission even noted that the parties were free to negotiate lower rates.[8]

Unfortunately, when put into practice, the "implicit fee" formula has utterly failed to meet the goals set forth by Congress and the Commission. To the contrary, to date the formula has succeeded only in making a bad situation for leased access programmers worse.

Where We Were Before the FCC's Rules

Telemiami is a full-time Hispanic commercial lease access channel as defined by Section 612 of the Communications Act. Telemiami is an advertiser-supported tier programmer. We therefore fit within the "lower implicit fee" classification under the regulations in the Commissions Report and Order, because we do not charge subscribers directly on a per-event or per-channel basis, nor do we derive our income by selling products

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[5] Id. at 489 (citing House Report).

[6] Id. at 493 (citing Senate Report).

[7] Id. at 521.

[8] Id. at 519.

directly to customers through home shopping or infomercials.[9]

Telemiami has been serving the needs of the Hispanic community in Dade County, Florida since 1988. Our importance to the community we serve is independently confirmed by our high Nielsen rating. Since November of 1995, we have ranked third in viewership numbers, behind only the broadcasters Univision and Telemundo, in the local Hispanic market.

When Telemiami entered the South Florida market back in the 1980s, local cable operators welcomed our programming, because we provided a voice for the 52% Hispanic population in Dade County. At that time, even under the more unfavorable leased access provisions of the 1984 Cable Act, cable operators still made available full-time channels for our use at no cost.

Originally, all our contracts with the cable operators provided that the operator could receive a percentage of our advertising revenue as compensation for use of a channel on its system, but we paid no cash. As more national cable networks affiliated with cable operators developed, however, Telemiami began to feel more and more pressure, financial and otherwise, from cable operators to relinquish our channel space. Even though our contracts did not require it, in 1991 we renegotiated two of our four contracts with operators to provide for fixed fees of $3,500 and $5,000 per month as compensation just to be able to continue on their systems.

The Problems Created by the FCC's Rules

Put simply, the commercial lease access regulations promulgated by the May 3, 1993 Report and Order do not work when put into practice. In January of 1994, we were contacted by two of the cable operators who carry our programming and were told that the FCC's new rules "forced" them to increase the commercial leased access rate they charged us. Effective in 30 days, the $3,500 per month rate was raised to $26,000 per month by one operator; another operator increased the rate from a percentage of advertising revenues to a fixed fee of $20,000 per month. We were also given a standard contract and told that the provisions contained in the contract were non-negotiable: "take it or leave it."

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[9] Report and Order at ¶ 516.

After obtaining a copy of the Report and Order and consulting with counsel, we contacted the cable operators and pointed out to them that the rates quoted were "maximum rates" and that the Commission encouraged the parties to negotiate down from that figure. The operators' response was that they were entitled to that amount and would not negotiate.

We then asked for a written explanation of how the operators arrived at these figures using the formula set forth in the Report and Order. The response was complete silence on the issue.

We then pointed out that the other provisions of the contract were not controlled by the Report and Order. The operators' response was that their attorneys had told them not to speak with us.

To put in perspective what these increased carriage rates mean in practical terms to the survival of commercial lease access; and to demonstrate how Congress' concerns regarding an operator's denial of commercial leased access can be driven by anti-competitive motives and financial interests, I will tell you about our experience with a third operator.

Telemiami has been trying to obtain a channel on a cable operator's system since 1990. This operator serves an area which is 82% Hispanic, yet only 8% of the channels it carries are Spanish-language channels. Of those channels, the only local Spanish-language carried is a channel which is owned and operated by the operator and which competes for the same advertising dollars that we do.

We were consistently denied a contract by the operator. In 1994, we requested a rate under the Report and Order and were quoted an astronomical rate of $36,141 per month for full-time use. Needless to say, that rate put leased access on that system out of our reach and that of any other local programmer. And indeed, this operator did not carry then -- and does not today -- carry any leased access programmers at all.

In November 1995, we were quoted an even higher figure for leased access of $52,122 per month for full-time use. We complained that the figure was too high and were told that we were free to purchase time slots on the operator's own Hispanic-language cable channel to run our locally-produced programs. In other words, we were told we could pay the operator to provide it with programming to attract viewers to its channel and increase the operator's advertising revenue. This, I do not believe, is what Congress and the Commission had in mind.

Telemiami receives no revenue from subscribers. The monthly rate of $36,141 quoted

by the operator in 1994 results in an annual lease access fee of $433,692. Our total annual revenue is currently only a fraction of that amount. In comparison, in 1994, the same operator paid a total of $828,720 in franchise fees to Dade County and the cities it serves for the privilege of earning $30,457,036 in revenues.[10] In other words, if only one leased access programmer were willing or able to pay the quoted rate, that would cover over 1/2 of the operator's franchise fee obligation for the entire year. Not surprisingly, no leased access programmer is on the system at all.

Also keep in mind that since we are advertiser-supported, we compete against all cable operators locally for advertising revenue. Operators consistently undercut our advertising rates by offering 30-second commercial spots at $49 per spot, and sometimes for even less than that. Since we only have programming on one channel to place spots, versus a cable operator's 30+ channels with advertising sales availability, a leased access programmer must be carried on more than one system in a market area just to survive.

The rates imposed by just a single cable operator in Miami under the FCC's current "implicit fee" are so exorbitant that no leased access programmer in its right mind would enter this business. Now, multiply that fee by more than one cable system (carriage on multiple systems is essential for survival) and the "implicit fee" is the death of leased access.

As proof of this, one need look only at the Miami market. In the Miami area alone, three full-time leased access programmers (two of them Hispanic) have been forced to drop off of all area cable systems because they could not afford rates calculated under the FCC's "implicit fee" formula. We survive only by virtue of the Commission's orders allowing us to continue to pay the rates we paid before the FCC's rules were adopted. And we hang by a thread.

The dispute resolution process in the Report and Order also has a fatal flaw: To dispute the operator's rates or terms, the leased access programmer must pay the operator's exorbitant rate during the pendency of the dispute. Leased access programmers are small businesses; they do not have that kind of money. The result is that their only means of redress is made impossible by financial constraints. This has no doubt given the Commission the false sense that 1) there is no interest in leased access; and 2) the current regulations work. The sad truth, however, is that the lack of more leased access complaints is nothing but a symptom of how effectively cable operators can snuff out any interest in leased access

[10] Figures taken from the 1994 Operational Data Statement filed with the local franchising authority by the operator.

under the current rules.

Another problem with the dispute resolution process is the "clear and convincing" standard of proof. This is far from the norm in civil actions. Moreover, much of the relevant evidence is in the operator's hands, and the leased access programmer has no right to a discovery process. The result is a "clear and convincing" burden of proof that is impossible to meet.

The bottom line is that, although clearly adopted with the best intentions, the FCC's current leased access regulations have succeeded only in giving cable operators carte blanche to circumvent Congress' clear intent in Section 612.

The Rules Need Substantial Revision

The regulations set forth in the Report and Order were intended by the Commission:

> to assure that the leased access option brings about the intended diversity of programming and competition in programming delivery. Because few programmers have exercised their option to lease access since 1984, **we believe that it is important to monitor this market and to make timely adjustments to the rules if necessary.**[11]

The Commission must abandon the current rules and adopt a new approach to maximum rate-setting and dispute resolution. Cable operators cannot be trusted to act in good faith and negotiate down from a maximum rate. Any "maximum" rate will also be the minimum rate. Fair and just access to dispute resolution must be available to all interested parties regardless of financial ability. The burden of proof must meet a reasonable standard and discovery must be made available to all parties.

Channel placement also must be addressed so that commercial leased access programmers are placed upon the expanded basic tier and receive a channel placement within the consecutively numbered channel line-up. This request is based again upon our own experience. One of the cable operators that carries us recently tried to move us and another leased access programmer from placements on channels 40 and 43 (within the consecutively-

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[11] Id. at ¶ 530 (emphasis added).

numbered channels 2 through 59) to channels 95 and 96 (placements 36 channels away from the last programmed channel). In attempting to channel move, the operator 1) failed to notify us of the changes, so that we were unable to publicize the channel changes in advance to our viewers and advertisers; and 2) failed to notify 75% of the operator's subscribers who have converter boxes that they could only see us if they tuned in to channels 60 and 61 (rather than the channels 95 and 96 listed on the operator's rate card). Channel placement is another loophole in the law that is used by cable operators to make leased access an impossible business proposition.

I have one final comment: every cable operator who states to this Commission that there is nothing wrong with the current regulations and/or that there is no interest in leased access, should be asked one question: Is that operator currently fully meeting the set-aside requirement under Section 612 of the law? In order to be able to make either of those two claims, cable operators must prove that the regulations actually allow leased access programmers to survive, and that they actually are carrying their full complement of leased access channels. If the rest of the country is like Dade County, the cable operators' only honest answers to those questions will be "no."

Thank you for your kind attention.

Very Truly Yours,

Maria Silveira
Vice President & General Manager

cc: William F. Caton

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